

TENNESSEE GENERAL ASSEMBLY
FISCAL REVIEW COMMITTEE



FISCAL MEMORANDUM

SB 1447 – HB 1872

March 10, 2014

SUMMARY OF ORIGINAL BILL: Requires all state agencies to identify, evaluate, avoid, neutralize, and mitigate actual or potential organizational conflicts of interest (OCI), as defined in the bill, before awarding or amending any contract for goods or services. Contracts that are entered into or amended that are in violation of this bill will be considered void. Authorizes a contract that is otherwise void to continue for a minimum period of time necessary to protect the public health or welfare at the discretion of the Comptroller of the Treasury (COT) until an alternative can be arranged. Requires the Chief Procurement Officer (CPO) and the COT to be notified immediately when a contract is found to be in violation.

CORRECTED FISCAL IMPACT OF ORIGINAL BILL:

Other Fiscal Impact – Any fiscal impact will occur during the procurement of contracts for state services. The number of additional Requests for Proposals and the resulting increase or decrease in costs is not quantifiable. Due to a number of unknown factors, including but not limited to, the current number of consultants who transitioned into a vendor contracting with the state for the services consulted, the bids that would be received for any contracts during the normal procurement process, and the state's ability to negotiate cost for services that would be included in any of the contracts, an exact fiscal impact cannot be reasonably determined.

SUMMARY OF AMENDMENT (013689): Deletes all language after the enacting clause. Defines agency, consultant, contractor, organizational conflict of interest (OCI), and unfair competitive advantage. Requires all state agencies to identify, evaluate, avoid, neutralize, and mitigate any actual or potential OCIs before awarding or amending any contract for goods or services. Requires a contractor to disclose to the agency the existence of any OCI known prior to the award of a public contract or discovered during contract performance. Requires such disclosure to contain all facts and dates relevant to the OCI. Requires each state agency, during the procurement process, to document any potential or actual OCI and its proposed measures to avoid, neutralize, and mitigate such conflict. If an actual OCI is discovered after the award or approval of a contract, the agency is required to make an immediate and full written disclosure to the COT. Such disclosure shall include a description of the conflict and the action that the agency has taken, or proposes to take, to mitigate such conflict. Authorizes the COT to terminate a contract, require an agency to take further steps to adequately mitigate the conflict; or approve the continuation of the contract to protect the public health and welfare if the COT determines an actual OCI exists between a contractor and an agency if such OCI was discovered pursuant to the required disclosure process.

FISCAL IMPACT OF BILL WITH PROPOSED AMENDMENT:

Increase State Expenditures - \$91,800

Other Fiscal Impact – Any fiscal impact will occur during the procurement of contracts for state services. The number of additional Requests for Proposals and the resulting increase or decrease in costs is not quantifiable. Due to a number of unknown factors, including but not limited to, the current number of consultants who transitioned into a vendor contracting with the state for the services consulted, the bids that would be received for any contracts during the normal procurement process, and the state’s ability to negotiate cost for services that would be included in any of the contracts, an exact fiscal impact cannot be reasonably determined.

Assumptions for the bill as amended:

- There are three basic forms of OCIs: unequal access to information, biased ground rules, and impaired objectivity.
- Unequal access to information may exist if, in performing a contract, a contractor obtains access to nonpublic information that will give it an unfair competitive advantage over other contractors. This OCI will arise when an incumbent contractor has proprietary information of other contractors or other nonpublic information not provided to competitors that gives the contractor unique insight into the bidding or evaluation process.
- As a general rule, being an incumbent, and thereby having a better understanding of the customer and/or work, is not deemed to be an unfair advantage in a re-competition of the same contract. Experience is considered a natural advantage of incumbency.
- Biased ground rules arise when a contractor has the ability to set the ground rules for another procurement. An example would be where the contractor writes the specifications or statement of work (SOW), and then bids on the SOW. The contractor could skew the competition in its own favor, or gain an unfair advantage in the competition of those requirements by virtue of its special knowledge of the agency’s future requirements.
- The Federal Acquisition Regulation (FAR) on Organizational and Consultant Conflicts of Interest contains numerous exceptions to situations that do not constitute conflicts. The basis statement of the conflict provides that the rule does not apply to situations in which contractors, acting as industry representatives, help government agencies prepare a SOW or specifications, provided this assistance is supervised and controlled by government representatives. In this situation, typically the government is obtaining the input through an open information call, such as a Request for Information (RFI), rather than a task under an existing contract.
- The GAO has stated that the mere existence of a prior or current contractual relationship between a contracting agency and a firm does not create an unfair competitive advantage, and an agency is not required to compensate for every competitive advantage gleaned by a potential vendors’ prior performance of a particular requirement. For example, an incumbent contractor’s acquired technical

expertise and firsthand knowledge of the costs related to a requirement's complexity are not generally considered to constitute unfair advantages the procuring agency must eliminate.

- Impaired objectivity may exist if a government contractor contract is required to evaluate work it performed under a separate contract, performed by a separate entity in which it possesses a financial interest, or performed by a competitor. Contractors may not be able to behave objectively because of other economic pressures and consequences.
- An OCI could exist with respect to existing contracts or to a future procurement.
- Estimate assumes departments and agencies are already identifying and evaluating actual or potential OCIs before awarding or amending contracts.
- Few contracts will be considered void as departments and agencies are expected to exercise due diligence in identifying and evaluating such conflicts of interest and mitigating any identified conflicts of interest.
- Contracting officers must consider potential conflicts during preparation of the solicitation and during the evaluation of offers. Through solicitation provisions and contract clauses, contractors can be directed to identify OCIs and develop a proposed mitigation plan. The mitigation plan should be incorporated in the contract and therefore a requirement of the contract.
- Mitigation involves actions by a contractor to mitigate a conflict by implementing firewalls or using a conflict-free subcontractor or team member to perform the work. Agencies can take an affirmative action to eliminate or mitigate conflicts by reassigning certain work scope.
- According to information provided by the National Conference of State Legislatures (NCSL), there are 30 states that have either a statute, rule or regulation, or procedure that limits a contractor's ability to submit a bid or proposal where the contractor has assisted in preparing a solicitation, statement of work, or specification. For example, the State of Minnesota has a statute regarding OCIs that states to avoid an OCI, the Commissioner may utilize methods including disqualifying a vendor from eligibility for a contract award or canceling the contract if a conflict is discovered after a contract has been issued. To mitigate or neutralize a conflict, the Commissioner may use methods such as revising the scope of work to be conducted, allowing vendors to propose the exclusion of task areas that create a conflict, or providing information to all vendors to assure that all facts are known to all vendors.
- North Dakota has a statute in effect since August 1, 2004, that specifies when a purchasing agency has specifications prepared by someone other than a state employee or official on behalf of the state, that person or business entity must be excluded from submitting bids or proposals.
- California's conflict of interest states no person, firm, or subsidiary thereof who has been awarded a consulting services contract may submit a bid for, nor be awarded a contract on or after July 1, 2003, for the provision of services, procurement of goods or supplies, or any other related action that is required, suggested, or otherwise deemed appropriate in the end product of the consulting services contract.
- Other states offer the proposer the opportunity to avoid or neutralize the OCI; disqualify the proposer from further participation in the procurement, cancel the procurement, or if the award has already occurred, declare the proposal non-responsive

and award the contract to the next responsive best value proposer. If the proposer was aware of an OCI prior to the award of the contract and did not disclose it, the contract can be terminated for default.

- OCIs may be avoided by ensuring that more than one contractor prepares the specifications or the SOW for a competitive solicitation and by state agencies exercising oversight in independently reviewing the SOW to ensure that the requirements document is not biased in favor of a particular approach or product.
- The proposed legislation could result in state agencies and departments having to conduct more Requests for Proposals (RFPs) by preventing consultants from bidding on contracts that they have helped create the requirements for, therefore having an unfair advantage. Conducting more RFPs could result in more competition and better pricing or it could result in fewer vendors bidding on RFPs resulting in higher costs for the state. In instances where the contract was already awarded and was subsequently deemed non-responsive and the contract was awarded to the next responsive best value proposer, the actual costs could be higher or lower since not all contracts are awarded on cost alone.
- According to the Comptroller's Office, the disclosure and analysis process would require that policies and procedures be established as well as a process to handle each case. This would require an additional full-time position of a higher skill level. A specialist position would be required to handle the additional workload and responsibility resulting in a recurring cost of \$91,784 (\$69,660 salary + \$22,124 benefits and insurance).

CERTIFICATION:

The information contained herein is true and correct to the best of my knowledge.



Lucian D. Geise, Executive Director

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